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No. 79-220

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1979. The petition for a writ of certiorari was filed on August 10, 1979. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner is entitled to have his guilty plea set aside because the district court, in explaining the consequences of a plea of guilty to a heroin possession charge, stated that he would be subject to a special parole

term of at least three years but did not state that the imposition of such a term is mandatory if a sentence of imprisonment is imposed.

2. Whether petitioner was adequately advised during the Rule 11 proceeding that he could not be compelled to be a witness against himself if he elected to stand trial.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of Michigan to one count of possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a). He was sentenced to five years' imprisonment, to be followed by five years' special parole. On direct appeal, the court of appeals affirmed (Pet. App. A3).

ARGUMENT

Petitioner contends that Rule 11, Fed. R. Crim. P., was violated in two different respects during his guilty plea hearing.

1. Petitioner's initial contention is that he was not advised of the mandatory nature of the special parole term under 21 U.S.C. 841(b) at the time he pleaded guilty.[1]

[1]Petitioner did not present this claim to the district court by raising an objection at the time sentence was imposed, by filing a motion to withdraw his guilty plea pursuant to Rule 32(d), Fed. R. Crim. P., by filing a motion for modification of sentence under Rule 35, Fed. R. Crim. P., or otherwise.

During the course of the plea hearing, the district court gave petitioner the following advice concerning the potential sentence he faced (Tr. 5):

THE COURT: Do you also understand, Mr. Williams, that ordinarily this charge would carry a maximum penalty of fifteen years in prison, a twenty-five thousand dollar fine, and a special parole term of at least three years?

[PETITIONER]: Yes.

THE COURT: Do you understand that the special parole term of three years, of at least three years, because it can be more, can be tacked onto a sentence if you were to be put on parole and you violated parole? Do you understand that?

[PETITIONER]: Yes.

THE COURT: Now, I understand that you and the United States Government and your attorney entered into an agreement. Under the terms of that agreement, it is recommended to me that if I should decide to send you to prison, that I send you for no more than seven years.

~~THE COURT:~~ Is that a part of your understanding?

[PETITIONER]: Yes.

THE COURT: Further, that I could impose a special parole term of at least three years and it could be more than three years?

[PETITIONER]: Yes.

a. Petitioner contends (Pet. 5) that this colloquy did not comply with Rule 11(c)(1), which provides that before accepting a plea of guilty, the court must inform the defendant of, and determine that he understands, "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." Specifically, petitioner asserts that in failing to inform him of the mandatory nature of the special parole term, the court misstated the maximum penalty provided. However, the first of the court's statements quoted above clearly was correct in informing petitioner that the maximum penalty for the charge against him was 15 years' imprisonment, a $25,000 fine, and a special parole term of "at least three years."[2]

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[2]A number of courts of appeals have held that a district court does not comply with Rule 11(c)(1) merely by advising the defendant that a special parole term of at least three years must be included if some term of imprisonment is imposed and that some further reference to the absence of a statutory maximum or the possibility of a lifetime special parole term is necessary. See, *e.g.*, *Moore* v. *United States*, 592 F. 2d 753 (4th Cir. 1979); *United States* v. *Eaton*, 579 F. 2d 1181 (10th Cir. 1978); *Richardson* v. *United States*, 577 F. 2d 447 (8th Cir. 1978), cert. denied, No. 78-5263 (May 29, 1979); *United States* v. *Alejandro*, 569 F. 2d 1200 (2d Cir. 1978). See also *Yothers* v. *United States*, 572 F. 2d 1326 (9th Cir. 1978); *United States* v. *Del Prete*, 567 F. 2d 928 (9th Cir. 1978); *United States* v. *Wolak*, 510 F. 2d 164 (6th Cir. 1975) (all cases in which the court's explanation of the special parole term did not specify the possibility of a term of more than three years). While a further explanation of the special parole term is doubtless preferable, we disagree with the holding of these cases that an explanation such as was given here violates Rule11. Rule 11(c)(1) was intended to require judges to inform defendants only of those maximum and minimum sentences "usually readily ascertainable from the face of the statute defining the crime * * *." Advisory Committee Notes to the 1975 Amendments to Rule 11, 62 F.R.D. 271, 279 (1974). The district court's explanation to petitioner here, as in several of the cases cited above, tracked the statutory language in

Nor was the court's explanation of the sentence facially incorrect with respect to a mandatory minimum sentence. Although the court several times described its sentencing options in terms of what it could do, rather than what it must do, this explanation was not inaccurate. A special parole term is not a mandatory minimum penalty in all cases under 21 U.S.C. 841; it is required only where the defendant is sentenced to some term of imprisonment. Moreover, the court's reference to a special parole term of "at least" three years should have conveyed to petitioner the mandatory nature of the special parole term under those circumstances.

Finally, the statement specifically relied upon by petitioner (Pet. 4)—that a special parole term of at least three years "can be tacked onto a sentence if [he] were to be put on parole and [he] violated parole"—does not even appear to have been intended by the court to be a description of its sentencing options. Rather, it describes the *effect* of the special parole term: if petitioner violates the special parole, additional time will be added to the original sentence of imprisonment. See 21 U.S.C. 841(c).

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referring to a special parole term of "at least three years," see *United States* v. *Keller*, 594 F. 2d 939, 942 (3d Cir. 1979), and therefore complied with the terms of the rule.

In any event, petitioner did not object in the court of appeals to the district court's explanation of the special parole term as being of "at least three years," and he does not raise any such objection in his petition in this Court. Moreover, there is no reason to believe that the reference to "at least three years" misled petitioner in this case. He received a special parole term of only five years, which is reasonably close to the statutory minimum and considerably short of the possible lifetime term that has led the courts of appeals to suggest a more complete explanation of the potential duration of the special parole term. Furthermore, the court pointed out later in the colloquy (page 3, *supra*) that "it could be more than three years."

Thus, although the district court might have given a fuller explanation of the special parole term, there was not a violation of the literal requirements of Rule 11(c)(1) here.

b. If it were concluded that the failure to specify the mandatory nature of the special parole term in the event a sentence of imprisonment is imposed constituted a technical violation of Rule 11, as petitioner asserts, the case would present the important question whether automatic reversal of the conviction is thereby required, even though it is clear that petitioner suffered no prejudice as a result of the failure to comply with the rule in this particular.

The Court held in *McCarthy* v. *United States*, 394 U.S. 459 (1969), that a defendant is entitled to plead anew if a district court accepted his plea without adhering to the procedure provided for in the less elaborate version of Rule 11 then in effect. A number of courts of appeals have interpreted *McCarthy* to require automatic reversal when the district court has failed adequately to explain the nature of the special parole term, even in the absence of a showing of prejudice. See, *e.g.*, *United States* v. *Keller*, 594 F. 2d 939, 942-943 (3d Cir. 1979); *United States* v. *Palter*, 575 F. 2d 1050 (2d Cir. 1978); *United States* v. *Del Prete*, 567 F. 2d 928, 929 (9th Cir. 1978); Cf. *United States* v. *Eaton*, 579 F. 2d 1181, 1182-1183 (10th Cir. 1978).

But there have also been suggestions in this and other settings, with which we agree, that an absence of strict compliance with Rule 11 should not lead to automatic reversal where the departure was technical or insubstantial and where it is clear that the defendant could not have been prejudiced. *United States* v. *Palter*, *supra*, 575 F. 2d at 1051, citing *United States* v. *Alejandro*, 569 F. 2d 1200,

1202 (2d Cir. 1978) (Hays, J., dissenting); *United States* v. *Saft*, 558 F. 2d 1073, 1081 (2d Cir. 1977); *United States* v. *Michaelson*, 552 F. 2d 472, 477-478 (2d Cir. 1977); *United States* v. *Scharf*, 551 F. 2d 1124, 1129-1130 (8th Cir.), cert. denied, 434 U.S. 824 (1977); *United States* v. *Lambros*, 544 F. 2d 962, 966 (8th Cir. 1976), cert. denied, 430 U.S. 930 (1977).

The present case illustrates the force of the proposition that the harmless error rule of Fed. R. Crim. P. 52(a) should be followed in the case of inconsequential violations of Rule 11.

As pointed out above, the district court described the maximum sentence of 15 years' imprisonment, a $25,000 fine, and a special parole term of at least three years in terms that tracked the statutory language. There is not the least suggestion that petitioner did not understand the potentially mandatory nature of the special parole term or the fact that it could exceed three years in duration (as, indeed, the judge explicitly stated). Nor is there any indication that, whether or not he was fully aware of these nuances, they had any bearing upon his decision to plead guilty.

Petitioner does not argue in his petition, and he did not argue in the court of appeals, that he was unaware of the existence or nature of the special parole term or that he would not have pleaded guilty if the district court had explained the special parole term in different words. *United States* v. *Timmreck*, No. 78-744 (May 21, 1979), slip op. 4; *United States* v. *Salas*, No. 79-1048 (9th Cir. August 13, 1979). Nor would any such claim be credible. Petitioner pleaded guilty pursuant to an agreement under which the court could impose a sentence of imprisonment of up to seven years and a special parole term of at least three years. Even if petitioner was not aware at the time that a three-year special parole term was mandatory in

some circumstances, it seems inconceivable that his decision to plead guilty could have been affected by knowledge that this latter aspect of the sentence that he was willing to accept under the plea agreement was mandatory rather than discretionary. The absence of prejudice is underscored by the fact that the total sentence of ten years actually imposed (five years' imprisonment and five years' special parole term) was within the maximum sentence of seven years' imprisonment and at least three years' special parole of which he had been informed. Compare *Moore* v. *United States*, 592 F. 2d 753 (4th Cir. 1979), with *Bell* v. *United States*, 521 F. 2d 713, 715 (4th Cir. 1975); *United States* v. *Alejandro*, *supra*, 569 F. 2d at 1202 (Hays, J., dissenting). Cf. *Richardson* v. *United States*, 577 F. 2d 447, 452 (8th Cir. 1978), cert. denied, No. 78-5263 (May 29, 1979). Any error in failing to advise petitioner of the mandatory nature of the special parole term was therefore harmless.

We believe that, in an appropriate case, the question whether the harmless error doctrine of Fed. R. Crim. P. 52(a) applies to technical violations of Rule 11 in accepting guilty pleas that are then challenged on direct appeal is one that might warrant consideration by this Court. Because of the substantial weaknesses in petitioner's claim that the rule was violated in this case, however, we do not believe that this is an appropriate case for the Court to take for the purpose of determining that question. (The question whether Rule 11 was violated here is, we believe, not of sufficient importance to justify review.)

2. Petitioner's second contention—that he was not advised of his Fifth Amendment privilege against compulsory self-incrimination—is plainly contradicted by

the record. The district court explained that right as follows (Tr. 9) (emphasis added):

> THE COURT: Do you also understand that if you had a trial and you wanted to take the stand to testify in your own defense, you could do so but you wouldn't be *required* to do so? Do you understand that?
>
> [PETITIONER]: Yes, sir.
>
> THE COURT: And do you understand that if for any reason whatsoever you decided you did not want to take the stand, that could not be held against you—that is, no one could say or infer that you were guilty because you did not take the stand?
>
> [PETITIONER]: Yes.

Petitioner finds this explanation of his Fifth Amendment right inadequate because the court used the word "required" rather than "compelled." This distinction lacks substance. There is no magic formula for explaining each constitutional right waived by pleading guilty. *United States* v. *Keller*, *supra*, 594 F. 2d at 943; *United States* v. *Safi*, *supra*, 558 F. 2d at 1081-1082; *United States* v. *O'Donnell*, 539 F. 2d 1233, 1235 (9th Cir.), cert. denied, 429 U.S. 960 (1976). The district court clearly informed petitioner that if he proceeded to trial he would not have to testify. No more was required.

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted.

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